

STATE OF MICHIGAN
COURT OF APPEALS

TONICA DONALDSON,

Plaintiff-Appellant,

v

ROBERT DONALDSON,

Defendant-Appellee.

UNPUBLISHED

January 3, 2003

No. 236944

Oakland Circuit Court

LC No. 93-464851-DM

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for a change in custody. We affirm.

I. Procedural History

Following the parties' divorce in 1994, plaintiff was awarded sole physical custody of their child. On July 19, 2000, defendant filed a motion to change physical custody, alleging that there were several changed circumstances warranting reconsideration of the custody order. The matter was referred to the Friend of the Court (FOC) for psychological evaluations. In January 2001, plaintiff moved with the child to Kingsley, Michigan, which is over one hundred miles from defendant's residence and the child's former residence as established by court order. In response, defendant filed an emergency motion for an immediate temporary change of custody so that the child could finish the school year at the same school. On the same day, plaintiff filed an emergency motion for permission to move more than one hundred miles from defendant's residence. On January 17, 2001, before defendant's motion for change of custody was decided, the trial court entered an order awarding temporary custody to defendant pending the evidentiary hearing. The trial court found that there was proper cause to revisit the issue of custody and, after considering all of the statutory best interest factors following an evidentiary hearing in July 2001, the trial court entered an order permanently changing sole physical custody to defendant.

II. Analysis

A. Standard of Review

In custody cases, this Court reviews for clear legal error a trial court's choice, interpretation, or application of the existing law. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634

NW2d 363 (2001). This Court employs the great weight of the evidence standard to review findings of fact. *Id.* at 5. This Court will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *Id.* The trial court's discretionary rulings, including a determination on the issue of custody, are reviewed for an abuse of discretion. *Id.*

A custody order may be modified on a showing of proper cause or a change in circumstances. MCL 722.27(1)(c); see *Foskett*, *supra* at 5. Where the party seeking to change custody has not carried the initial burden of establishing either proper cause or change of circumstances, the trial court is not authorized to revisit an otherwise valid custody order or consider the statutory best interest factors. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). After this initial burden is met, a determination of whether a change in custody would be in the child's best interest is made by weighing the best interest factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). A trial court must consider and explicitly state its findings and conclusions with respect to each of the factors. *Foskett*, *supra* at 9. In the present case, the trial court found that an established custodial environment existed with plaintiff. Accordingly, the trial court could modify the existing custody order only upon defendant's presentation of clear and convincing evidence that the modification was in the child's best interests. MCL 722.27(1)(c); *Foskett*, *supra* at 5.

B. Trial Court's Consideration of Plaintiff's Intrastate Move

Plaintiff first argues that the trial court improperly based its decision to revisit the best interest factors on plaintiff's proposed intrastate move from Grand Blanc to Kingsley. We disagree. It is apparent from the timing and content of defendant's motion for physical custody that the trial court did not base its decision to revisit the statutory best interest factors solely on plaintiff's move.¹

First, defendant filed his initial motion for physical custody in July 2000, which was before he learned of plaintiff's desire to move to Grand Blanc. Second, defendant's July 2000 motion alleged numerous circumstances that were supported by the record evidence and which warranted the trial court's reconsideration of the existing custody order, including, *inter alia*: (1) the child's preference to live with defendant; (2) defendant's allegations that plaintiff kept too many pets in an unsanitary home; (3) plaintiff's refusal to allow the child to speak about defendant; and (4) plaintiff's continued hostility and refusal to communicate with defendant regarding the child. Defendant had numerous concerns relating to custody apart from plaintiff's proposed move. We therefore conclude there exists ample evidence to support the conclusion that the trial court did not improperly base its decision to reconsider custody solely on plaintiff's intrastate move.

¹ An intrastate move may not be considered to establish a change of circumstance. *Dehring v Dehring*, 220 Mich App 163, 166-167; 559 NW2d 59 (1996). However, there is no indication that the trial court in the present case revisited the issue of custody solely based on plaintiff's intrastate move. The lower court record does not contain a transcript of the proceeding held on August 15, 2000, which presumably concerned defendant's initial July 2000 motion for physical custody. Consequently, the lower court record does not reveal the trial court's specific findings regarding proper cause or change of circumstances.

C. Trial Court's Consideration of the Child's Expressed Preference to Change Residence

Plaintiff next argues that proper cause to revisit custody cannot be premised on the child's parental preference. The fact that a child expresses a desire to live with one parent is not, by itself, a sufficient basis upon which to revisit the issue of custody. *Curlyo v Curlyo*, 104 Mich App 340, 349; 304 NW2d 575 (1981). However, as previously stated, the trial court in the present case was presented with a number of circumstances that established proper cause to warrant an analysis of the best interest factors. We find no error in the trial court's decision to revisit the issue of custody.

Plaintiff also argues that the trial court failed to conduct a meaningful investigation of the child's parental preference before finding that best interest factor (i) favored defendant. Plaintiff failed to properly preserve this issue for appellate review by requesting that the trial court conduct an in camera interview with the child regarding her parental preference. This Court may review an unpreserved issue where failure to consider the issue would result in manifest injustice, if consideration of the issue is necessary to a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). In the present case, plaintiff conceded at the evidentiary hearing that the child wanted to live with defendant. Therefore, the trial court's failure to interview the child did not result in manifest injustice and did not constitute reversible error.

D. Trial Court's Consideration of Plaintiff's Use of Day Care Providers

Plaintiff next argues that the trial court improperly considered plaintiff's use of day care in finding that best interest factor (b) favored defendant. We disagree. MCL 722.23(b) examines "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." In evaluating best interest factor (b), the trial court concluded:

The capacity and disposition of the parties involved to give the child love, affection, guidance and continuation of the education and raising of the child in its religion or creed, if any[.] I believe again . . . that much of what I said before is still true, that mother is very dependent upon this child [and] mother looks upon the child to meet [mother's] needs. When asked why she wants to continue custody, she's given many reasons, all which in her mind are very good reasons, but . . . almost all of [mother's reasons] go back to the fact that this is what [mother] needs, it's [mother's] child [and] she's raised the child, even before birth, when the child was still in her womb.

I believe that [mother] is certainly aware of the physical needs of the child, but I do not believe she as well as the father is able to provide the other kinds of needs that this child has, particularly the needs for demonstrating of love and doing things continually with the child. Mother has certainly bought the child a horse and did things with the horse, but . . . when the child's with her[, much] is left to be done by a babysitter or caregiver or next-door neighbor.

Plaintiff relies on our Supreme Court's holding in *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996), as support for her argument that a trial court may not evaluate each party's arrangements for the child care and conclude that one party's arrangements are more acceptable than the other's. However, plaintiff's reliance on *Ireland* is misplaced. The trial court's conclusion regarding best interest factor (b) was not a comparison between plaintiff and defendant's respective child care arrangements, as in *Ireland*, but was rather an analysis of plaintiff's inability to provide for the child's emotional needs when she spends time with the child. Therefore, plaintiff's argument lacks merit.

Affirmed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Patrick M. Meter